

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 09-50026-reg

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6 In the Matter of:

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8 MOTORS LIQUIDATION COMPANY,

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10 Debtor.

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14 U.S. Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 August 1, 2013

19 10:22 AM

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22 B E F O R E :

23 HON ROBERT E. GERBER

24 U.S. BANKRUPTCY JUDGE

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1 Doc. #12463 Motion to Compel Roger L. Thacker, Roger L.  
2 Sanders, and Thomas J. Hanson to Participate in Mandatory  
3 Mediation with Respect to Claim No. 27105 Pursuant to the  
4 Second Amended ADR Order

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25 Transcribed by: Sherri L. Breach

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1 P R O C E E D I N G S

2 THE COURT: All right. I -- I think, even though  
3 I may have to dictate something, GM Motors Liquidation is  
4 going to be pretty short. Why don't we come up on that one?

5 Let me get appearances from both sides and then I  
6 have a couple of preliminary remarks.

7 MR. SMOLINSKY: Good morning, Your Honor. Joe  
8 Smolinsky of Weil, Gotshal & Manges for the Motors  
9 Liquidation Company GUC Trust. I'm here with my colleague,  
10 Lori Pines.

11 THE COURT: Okay. Thank you, Mr. Smolinsky.

12 MR. HELMER: Good morning, Your Honor. James  
13 Helmer of Cincinnati, Ohio. I'm here on behalf of Mr.  
14 Sanders, Mr. Thacker and Mr. Hanson on the relation of the  
15 United States.

16 THE COURT: Okay. Folks, I've read the papers. I  
17 don't need you to repeat things.

18 Mr. Smolinsky, I'm going to ask you to lead off,  
19 but only to the extent you need to tell me stuff you didn't  
20 already say. Same thing with you, Mr. Helmer.

21 Folks, the reason why we're here is a little hard  
22 for me to say. I think that even on the middle of the three  
23 mediation orders, I plainly have the power to order  
24 mediation of this. And to the extent there was any doubt in  
25 the second and the -- that the reasons eliminated by the

1 third. And to the extent there was still any ambiguity in  
2 the third, I have this, I think you acknowledged it at  
3 paragraph 22 of your submission, Mr. Helmer, that I have the  
4 power to do it anyway.

5 We're talking about throwing the debtor into a  
6 case that's been pending for 18 years, and if, as you can  
7 well imagine, I do, I want to get money into the pockets of  
8 GM's creditors. The last thing I want to do is put it in a  
9 land war in Asia and Cincinnati, or for that matter, before  
10 me.

11 I gather from some of the stuff -- and I don't  
12 want to get into 408 stuff -- that you weren't optimistic  
13 about the ability to settle, Mr. Helmer. But forgive me for  
14 being cynical on matters of discretion before me, but I have  
15 been in this court now for 13 years and people always start  
16 by telling me that and you would be amazed how many times we  
17 reach a settlement.

18 If I decided under the law, even if we don't have  
19 the authority under the orders, and I think we plainly do, I  
20 can order it. So I'll hear from both side from that  
21 perspective.

22 But I also have to tell you, Mr. Helmer, that when  
23 I sign orders, I have an understanding of what I'm trying to  
24 accomplish by them and the reason why the order dealing --  
25 what I understand I was doing when I was carving out the

1 government -- and, by the way, it wasn't just the federal  
2 government. It was the states and the tribe, and there was  
3 a reason why the tribe was in there. I don't enter a lot of  
4 orders that talk about tribes. The reason there was a tribe  
5 in there was it was -- at the time there was a whole bunch  
6 of environmental claims that I was hoping could be settled  
7 out, but might have to be litigated, and I didn't want to  
8 put burdens on those three governmental entities.

9 And, of course, the governmental entities also had  
10 lent a lot of money to the debtor and were talking about  
11 super prize (sic) that they had to creditor recoveries.  
12 Although it ultimately turned out after those orders were  
13 entered into that I determined that the avoidance action  
14 that the government was trying to grab by its super pry  
15 lacked underlying merit.

16 So I'll hear argument on it, but I don't think I  
17 need a lot, folks.

18 Okay. Mr. Smolinsky, I'll hear from you first.

19 MR. SMOLINSKY: Thank you, Your Honor.

20 I'm going to dispense with most of my comments  
21 because I think Your Honor understands where we stand today.

22 This claims is one of only a handful of claims,  
23 significant claims that remain to be reconciled. There can  
24 be no challenge to our assertion that the ADR procedures  
25 have been enormously successful in this case. Very few

1 claims have had to be litigated.

2 What -- what -- what I'm encouraged by is the fact  
3 that both parties here agree that it's time to -- to  
4 liquidate this case -- this claim and to fix a dollar  
5 amount. And Your Honor may have seen that there were  
6 pleadings filed in the last couple of days by Mr. Helmer  
7 that he supports the estimation process. And maybe at the  
8 end of this hearing --

9 THE COURT: Well, forgive me, Mr. Smolinsky.  
10 Again, triaging my matters, I only read the stuff that I  
11 need to read to deal with the crisis at the moment. And I  
12 haven't read anything other than the papers on this  
13 particular controversy that you and Mr. Helmer have today.

14 MR. SMOLINSKY: Maybe I can spend a minute because  
15 I think it will be helpful to Your Honor.

16 The GUC Trust had filed a motion seeking  
17 estimation of this claim. We scheduled it many months in  
18 advance so that we could hold a mediation in the interim,  
19 and immediately upon serving the motion to estimate, we sent  
20 out a notice to -- to start ADR proceedings. That's when we  
21 got into a dispute about whether mediation would be  
22 appropriate in this case or whether it's a designated claim  
23 under the ADR procedures.

24 So we didn't have a chance, obviously, yet, to  
25 mediate the claim. August 6th is the return date on our

1 motion to seek estimation.

2 It would be a good idea --

3 THE COURT: August 6th, Wednesday of next week?

4 MR. SMOLINSKY: Yes. Yes, Your Honor. I think it  
5 would be a good idea for Your Honor's time as well as Mr.  
6 Helmer's travel schedule if we could spend a few minutes,  
7 regardless of how this motion turns out, to just use it as a  
8 pretrial to talk about the estimation process in the event  
9 that the mediation is unsuccessful so that Mr. Helmer  
10 doesn't have to --

11 THE COURT: Well --

12 MR. SMOLINSKY: -- travel back --

13 THE COURT: -- pause, please, Mr. Smolinsky. You  
14 wouldn't be -- even if I granted your motion, you wouldn't  
15 be proposing to mediate it between now and next Wednesday,  
16 would you?

17 MR. SMOLINSKY: No, Your Honor. That's why we --  
18 we would like to use today to -- to dispense of the need to  
19 go forward on the 6th and that we just adjourn that motion  
20 out to some future date, depending on whether or not Your  
21 Honor orders the mediation.

22 THE COURT: Now I'm with you.

23 Continue, please.

24 MR. SMOLINSKY: And -- and based on a pleading  
25 that was filed by Mr. Helmer a few days ago in response to



1 our estimation motion, the good news is that Mr. Helmer  
2 agrees that the motion should be granted and that we should  
3 estimate the claim here before Your Honor. There's been  
4 some issues about lengths of -- length of briefs and things  
5 of that nature that I'm sure we could work out.

6 But, obviously, from the debtors -- from the  
7 debtors' perspective, from the GUC Trust's perspective it's  
8 very important that we have an opportunity to mediate this  
9 claim, to hear about what -- what the claimants' theories of  
10 damages are in this case that's been going on for 18 years.  
11 We've spent the time to get -- to delve into the trial that  
12 -- that was held on this claim back in 2004, I believe. And  
13 -- and we're ready to start that mediation process.

14 I think Your Honor knows that this claim needs to  
15 be mediated. Your Honor has better time than to sit before  
16 a hearing to estimate a claim if it's not necessary. And  
17 that's the only comments that I have.

18 THE COURT: Very well.

19 Mr. Helmer, can I hear from you, please?

20 MR. HELMER: Thank you, Your Honor.

21 In light of your comments, I just have a couple of  
22 items that I want to say about the Court's orders just  
23 because I have come a long way. I read the orders in a  
24 somewhat different fashion, obviously. The -- I took the  
25 word supplement to mean in addition to, not replacing, and

1 first -- for the first point, Your Honor.

2 And, secondly, as I read the mediation orders and  
3 the arbitration orders, false claims act claim -- I don't  
4 find anywhere in any of those orders, which, of course, is  
5 what we have. So I didn't think your orders covered this  
6 claim. I thought it also -- your orders exempted the United  
7 States. Two days ago in this court there's a decision by  
8 Judge Bernstein, Hopper Beach Craft, Inc. v United States  
9 Exrail Minges (ph). It's 2013 Westlaw 3831671, and at page  
10 13 Judge Bernstein talks about a non-intervening false  
11 claims act claim and who that claim really belongs to.

12 And his finding, Your Honor, which is consistent  
13 with what we presented to the Court, is that the -- my  
14 clients, the relators, are really statutorily designated  
15 agents of the United States; that the real party in interest  
16 remains the United States and the underlying debt belongs to  
17 the United States. So that's what we thought your order  
18 exempting the United States applied. We brought that to the  
19 attention of counsel. They said, no. We don't read it that  
20 way. There is another order. We read that order. We still  
21 don't see the -- where this claim is covered.

22 THE COURT: Pause, please, Mr. Helmer because I  
23 don't think anybody's suggesting that you could be  
24 criticized or sanctioned, or if they did I would throw  
25 anybody making that suggestion out. But as I understand the

1 language of the middle of the three orders, it's language  
2 that's in substance filed by the United States.

3 As understand QTem (sic) actions, the government  
4 gets the bulk of the benefits of the action that's been  
5 brought by the private litigant, and the private litigant  
6 gets a piece of the action. Is that an unfair  
7 characterization?

8 MR. HELMER: It is not, Your Honor. Some people  
9 refer to it as a bounty hunting statute. It's a reward  
10 that's paid by the United States for private citizens taking  
11 on the obligation to pursue and prosecute these cases.

12 THE COURT: And that's what your guys have done.

13 MR. HELMER: For 18 years, Your Honor.

14 THE COURT: Okay. And I don't doubt that there's  
15 been a lot of work done over those 18 years. The question  
16 is the extent to which we want to subject the other side  
17 and, for that matter, you. Well, you'll probably have to do  
18 it against the other guys anyway. I'm sure you're going to  
19 prosecute your claim against those other than GM. I gather  
20 there are entities under GM --

21 MR. HELMER: Our -- our trial has now been  
22 scheduled, Your Honor, for March of 2014, which is exactly  
23 nine years since we tried the case the first time and 19  
24 years since we filed it.

25 THE COURT: Yeah. Well, I think Dickens wrote

1 books about stuff like that.

2 MR. HELMER: Yeah. I'm -- I'm living it, Your  
3 Honor.

4 (Laughter)

5 THE COURT: But the -- the issue before me is a  
6 legal matter, although eventually we get to matters in my  
7 discretion as well.

8 Is -- you fit within the second order, the middle  
9 of the three, if your claim, even though it's for the  
10 benefit of the government in principal part, was filed by  
11 your guys, which by the textual analysis of the Supreme  
12 Court tells me to file -- to follow would suggest that the  
13 middle order does apply. And the purpose of the third order  
14 was to broaden the mediation power to -- to put it crudely,  
15 to give less things out of the litigation process. And as  
16 you acknowledged at paragraph 22 of your responsive papers,  
17 I got the power to do it under 360 anyhow.

18 So I -- I got to tell you that I'm hardly going to  
19 find fault with you and what you did, but I think you sense  
20 where I'm coming from.

21 MR. HELMER: I do, Your Honor. And if I could  
22 just make a couple of comments about we did represent to the  
23 Court that you can -- you have the authority to compel  
24 mediation no matter what your other orders say and you've  
25 now told me that you interpret the orders in a way that I

1 didn't read them, but they're your orders. They mean what  
2 you say they mean. But I would like to make a couple of  
3 comments on why I don't think you should exercise your  
4 discretion to direct mediation in this particular class.

5 THE COURT: Sure. Go ahead.

6 MR. HELMER: The first point I would like to make  
7 to Your Honor is that we did mediate this claim. We brought  
8 in a mediator that was selected by General Motors, paid him  
9 \$10,000 a day to come to Cincinnati. He spent three days in  
10 Cincinnati. After two hours it was pretty clear that --  
11 that this case was not going to get resolved, but we still  
12 spent three days with him to go through the process to see  
13 if there was some common ground here.

14 That was several years ago. The case did not  
15 settle obviously, Your Honor. But then what happened is --  
16 and my clients were --

17 THE COURT: Pause, please. I remember that it was  
18 a while ago.

19 MR. HELMER: Yes, it was.

20 THE COURT: It -- it was, what, about 2004 or  
21 thereabouts?

22 MR. HELMER: Mr. Smolinsky has represented that,  
23 Your Honor. Frankly, I just -- I don't remember. That  
24 sounds about right to me.

25 THE COURT: But I -- I take it you and he would

1 agree, at least to the extent that it was way before this  
2 bankruptcy was filed.

3 MR. HELMER: Absolutely, Your Honor. The  
4 bankruptcy is 2009. It was way before that.

5 But then what happened after -- and, of course, my  
6 clients attended this mediation. Then what happened after  
7 that, Your Honor, is we went through the litigation process  
8 as you noted, including a five-week trial, two trips to the  
9 Sixth Circuit Court of Appeals, a argument before the United  
10 States Supreme Court and a decision -- a second effort to  
11 get the case before the Supreme Court, which was rejected  
12 two weeks ago, a trip to Congress twice to have the statute  
13 amended which has now been determined by our court in  
14 Cincinnati, the Sixth Circuit in Cincinnati to be a  
15 constitutional enactment that applies to this case. All  
16 right.

17 Most of that -- most of that litigation process  
18 was financed and driven by General Motors. Again, different  
19 General Motors than who is before Your Honor, but it's the  
20 same General Motors as far as my clients are concerned in  
21 terms of driving this case and the expenditure of literally  
22 tens of millions of dollars in legal fees on this dispute.

23 THE COURT: Pause, please, because I'm taking  
24 everything you said as very, very true. The only  
25 qualification being that I think the trip to the Sixth

1 Circuit is to another room at Fifth Street in Cincinnati,  
2 isn't it?

3 MR. HELMER: I'm sorry, Your Honor. Could you  
4 repeat that?

5 THE COURT: That -- that the Cincinnati District  
6 Court in the circuit -- Sixth Circuit Court of Appeals are  
7 in the same courthouse in Cincinnati, aren't they?

8 MR. HELMER: You're correct, Your Honor. The  
9 Cincinnati District Court is, but this case was not tried in  
10 the Cincinnati District Court. It was tried in Dayton,  
11 Ohio.

12 THE COURT: Oh, it was tried in Dayton.

13 MR. HELMER: Yes, Your Honor.

14 THE COURT: See, also Southern District of Ohio.

15 MR. HELMER: Also Southern District.

16 THE COURT: Fifteen miles up the road.

17 MR. HELMER: That's -- that's correct, Your Honor.

18 THE COURT: Okay.

19 MR. HELMER: By -- by the way if you've ever been  
20 to Dayton in February --

21 THE COURT: I was in the Air Force in Dayton in  
22 February and I know Dayton in February, but I've also argued  
23 in what I think is that same building on Fifth Street in  
24 Cincinnati where the Sixth Circuit Court of Appeals sits.

25 MR. HELMER: Yes, Your Honor.

1 THE COURT: I've argued unsuccessfully, but argued  
2 in the Sixth Circuit.

3 MR. HELMER: Yes, Your Honor. It's across the  
4 street from my offices. I'm very familiar with it. I did a  
5 clerkship that took me through there, also.

6 In any event, Your Honor, again, Mr. Smolinsky has  
7 clients that he has to deal with and has to satisfy that  
8 he's operating in a fashion that's in their best interest,  
9 but so do I. And when I go to my clients and say, this is  
10 what's been suggested; that you must go to mediation in  
11 Chicago. You must pay for another mediator, at least half  
12 for another mediator to mediate this -- this claim again,  
13 and they say, okay. Well, what are our chances of success,  
14 and I point out the offer that was made -- and by the way,  
15 Your Honor, I do want to correct one thing that was not on  
16 my papers.

17 I didn't divulge that to the Court. The trust  
18 did. It's attached in two different places to their motion  
19 to --

20 THE COURT: You mean the big nest in the mediation  
21 process.

22 MR. HELMER: I'm sorry.

23 THE COURT: You mean the big nest in the mediation  
24 process?

25 MR. HELMER: Yes, Your Honor.



1 THE COURT: Okay.

2 MR. HELMER: You'll find it at page 75 and again  
3 at page 81 of their initial filing. I wasn't the one that  
4 disclosed it, but I did comment on it.

5 But in any event, Your Honor, that's a -- where I  
6 apply myself. I have to go to my clients and say to them,  
7 this -- this is where you are. There's this kind of offer  
8 that's on the table. You've been through this process  
9 before. You litigated with General Motors for the better  
10 part of two decades, and now they want you to go to Chicago  
11 and sit down with somebody else for the reason that Mr.  
12 Smolinsky says, and I'm going to quote him here, "to hear  
13 the damage theories in the case."

14 Well, I have two comments I want to make about  
15 that, and I'm -- I'm just about finished, Your Honor.

16 First, we tried the case for five weeks. I got my  
17 whole case in in those five weeks and much of the defense  
18 case was also put in through the witnesses that we called.  
19 There's transcripts of that. Twenty-four days of trial  
20 testimony, there's transcripts of that and what our damage  
21 theories were.

22 Next, the Sixth Circuit has two leading cases on  
23 how you calculate damages in a false claims act case. There  
24 is Compton versus Midwest Specialties, which was a case the  
25 government handled and won on summary judgment, and the

1 second case is U.S. Extra (sic) Robey (ph) versus Boeing,  
2 which I handled, which deals with how you calculate damages  
3 in one of these false claim act lawsuits.

4 So the legal parameters are set forth and  
5 established very well, at least in -- in our jurisdiction.

6 Third, Mr. Smolinsky wants more information about  
7 our damage theories. I don't have any problem sharing that  
8 information with him so he can give it to his clients. I  
9 think I've already done that. But if he wants me to point  
10 him to places in the record, point him to exhibits, point  
11 him to case law, I'm -- I'm very well content to do that,  
12 Your Honor, so that he gets the information that he says he  
13 needs a mediator to get out of me. I'll give it to him.  
14 I'll give it to him.

15 I think that's only fair for somebody that has the  
16 burden of proof in the case to let the other side know what  
17 it is you want and why you think you're entitled to it.

18 Let me make one final comment about the damages in  
19 this case, Your Honor. We do have a proof of claim in this  
20 case, a substantial one. As I understand, it's one of the  
21 last remaining large ones on the Court's docket. And, by  
22 the way, I would be remiss if I didn't congratulate the  
23 Court for the four years of effort you put into this case  
24 and all the claims that you have been able to resolve in  
25 moving this case forward. I have read a number of your

1 transcripts. There are people in Cincinnati that know you  
2 and speak very highly of you, and I can see why.

3 But this claim, Your Honor, we -- when we asked  
4 for \$50 million in our proof of claim, a very substantial  
5 amount, it is a fraction, it is a fraction of the damages  
6 that were caused to the United States by General Motors'  
7 conduct in failing to build the nation's destroyers in a  
8 fashion that the Navy --

9 THE COURT: You mean on the Burke (ph) list -- on  
10 the Burke class of vessels, the Arlene Burke class vessels.

11 MR. HELMER: Yes, Your Honor. They are -- they  
12 are the most powerful war ships ever built.

13 THE COURT: I -- I know a little bit about  
14 cruisers. It's a cruiser, not a --

15 MR. HELMER: No, Your Honor.

16 THE COURT: It's a -- or is it a destroyer?

17 MR. HELMER: It's a destroyer. It's 500 feet  
18 long, has a crew of about 450, and if you're interested,  
19 Your Honor, I was in Norfolk two weeks ago looking at them.  
20 Twenty-three of them are tied up because they're sequestered  
21 that are not --

22 THE COURT: Well, I --

23 MR. HELMER: -- patrolling.

24 THE COURT: -- I have my own problems with  
25 sequestering.

1 (Laughter)

2 THE COURT: Including the 5:00 curfew we have in  
3 this courthouse. But I think parties could be upset or the  
4 taxpayers would, if I went on field trips on the government  
5 dime. So -- but I take your point. I -- you -- you regard  
6 your allegations as very serious and, in substance, you're  
7 arguing that the government got ripped off. But that's a  
8 fact that needs to be tried by the ultimate trier of fact,  
9 which may or may not be me.

10 MR. HELMER: Well, Your Honor, if -- if I could  
11 pick up on something Mr. Smolinsky said. We absolutely  
12 agree with the trust that estimation is appropriate. His  
13 procedure that he's suggested to the Court, we even agree  
14 with that with a tweak or two here or there on the length of  
15 the briefs and on the fact that we think you should make the  
16 call based on what's submitted to you and that that should  
17 be the end of this. We don't think it should -- should --  
18 the litigation should continue after that point. We think  
19 the plan gives you that authority and that -- we point that  
20 out in the papers that you haven't looked at yet.

21 But with those two exceptions that we think --

22 THE COURT: To estimate a claim for allowance  
23 purposes is contested to stuff like feasibility, voting,  
24 reserves, that kind of thing?

25 MR. HELMER: Your Honor, you have mentioned some

1       comments that are foreign to me. I -- I'm sorry. I'm not a  
2       bankruptcy practitioner. I'm a trial lawyer and I don't  
3       quite understand what you just said, so I'm not sure it  
4       would --

5               THE COURT: Fair enough.

6               MR. HELMER: -- be appropriate for me to comment.

7               THE COURT: Okay.

8               All right. Anything else?

9               MR. HELMER: No, Your Honor. Thank you so much.

10              THE COURT: Thank you.

11              Mr. Smolinsky, briefly, please.

12              MR. SMOLINSKY: Your Honor, the reason why these  
13       destroyers are the most powerful destroyers in the world is  
14       that because these generators have been working without  
15       incident since 1985 --

16              THE COURT: Okay. They're --

17              MR. SMOLINSKY: So when you talk about --

18              THE COURT: But I take it there's a dispute  
19       between you and Mr. Helmer on that issue or --

20              MR. SMOLINSKY: When I talk about --

21              THE COURT: -- will be --

22              MR. SMOLINSKY: -- that --

23              THE COURT: -- if the case gets tried.

24              MR. SMOLINSKY: Yes. When I talk about damage  
25       theories I mean how you calculate how -- how the government

1 has been harmed.

2 Just to -- just to close the record, we believe  
3 these claims fall within the categories of claims that are  
4 subject to the ADR order. That covers product liability  
5 claims which are very similar to these types of claims as  
6 well as tort claims.

7 The District Court in Massachusetts has found that  
8 false claims act are statutory tort claims. I'll cite the  
9 U.S. Exrail West Morlin (ph) versus Amjen (ph), case 738 F.  
10 Supp. 2d 267, District of Massachusetts, 2010.

11 In regards to the -- Judge Bernstein's recent  
12 decision in Hawker (ph), I'll note and I think Your Honor  
13 understands that what he found was that false claims act or  
14 QTem (sic) claims are claims brought on behalf of the United  
15 States, not by the United States, and that's a distinction  
16 that we're making here with respect to the second amended  
17 ADR order.

18 And, again, with respect to the estimation  
19 procedures, we can talk about them at -- after Your Honor  
20 makes a ruling which will shed light into the timing of when  
21 an estimation procedure would have to commence.

22 Thank you, Your Honor.

23 THE COURT: Okay. Thank you.

24 Folks, sit in place for a moment, would you,  
25 please?

1 (Pause)

2 THE COURT: Folks, Mr. Helmer, you've more than  
3 easily satisfied me that your position was taken in good  
4 faith; that there are plausible readings that could support  
5 your position vis-à-vis the orders, and that sanctions would  
6 be silly.

7 But on the underlying issue as to whether or not  
8 your guys should be regarded -- required to mediate or if  
9 you should be required to -- required to mediate on their  
10 behalf, I'm concluding that you should be so required. And  
11 my findings of fact, conclusions of law and bases for the  
12 exercise of my discretion for coming to that view will  
13 follow.

14 In summary, I believe that claims of the nature  
15 that you wish to bring were covered by the second of the  
16 three orders, and even more clearly by the third. But that,  
17 also, in any event, the residual authority I have under  
18 Southern District of New York General Order M-360 would give  
19 me that power, even if I hadn't previously had it.

20 So we then get to the second question that you  
21 properly identified, which is whether I should do so in the  
22 exercise of my discretion.

23 In my view, a full-blown litigation in either the  
24 Ohio District Court or before me would be very time  
25 consuming and expensive, at least if I wanted to give due

1 process to both sides, appropriate due process to both sides  
2 which I always want to do. And it would be an inappropriate  
3 drain on the resources of the GM estate which insofar as  
4 possible I want to get into the hands of creditors. And  
5 would also impede a timely and responsible winding up of the  
6 GM estate.

7 It's facts I find that in November of 2009 the  
8 claimants, as relators under the false claims act, filed a  
9 \$50 million claim in this Chapter 11 case. The allegations  
10 occurred with the subject of the pending prepetition action  
11 that's been going on for many, many years. I was told 18  
12 years in the Southern District of Ohio. I thought it was  
13 Cincinnati where the Southern District also sits, but I was  
14 corrected to understand that it's in Dayton. And also the  
15 Sixth Circuit and even the U.S. Supreme Court.

16 The claim seeks damages and civil penalties  
17 allegedly owed by the debtors to the U.S., but under the  
18 false claims act private litigants have the ability to  
19 effectively carry the sword for the U.S. The U.S. gets the  
20 bulk of the recovery and is plainly a party in interest with  
21 a beneficial interest in the outcome. But the relators,  
22 the folks who are carrying the sword, have, as we all agree,  
23 a piece of the action in that recovery and have the  
24 incentive to bring it on behalf of the government.

25 On February 23rd, 2010, that's three-and-a-half-



1 years ago now already, I entered an order authorizing the  
2 implementation of ADR procedures, alternate dispute  
3 resolution procedures, authorizing alternative dispute  
4 resolution for certain "designated claims."

5 At that time they included personal injury claims,  
6 wrongful death claims, tort claims, product liability  
7 claims, all of the type that car companies get a lot of and,  
8 also, damages arising from the rejection of executory  
9 contracts, indemnity claims, certain kinds of lemon law  
10 claims, certain warranty claims and class action claims.  
11 They were later expanded to cover patent claims.

12 In October of that year, about eight months later,  
13 I entered the first mediation -- amended mediation order  
14 which provided that the procedures I just talked about  
15 wouldn't apply to claims filed by the United States of  
16 America or its agencies.

17 I had an understanding as to what I was  
18 accomplishing by that order. By the way, I should say that  
19 while what I just quoted is the portion that's relevant  
20 here, it also covered the states and the tribe. And I knew  
21 at the time that there were a lot of environmental actions  
22 that were being brought by the U.S. government itself and  
23 also by the EPA and also by the state AG's of many states  
24 and by the -- at least one tribe of Indians in upstate New  
25 York who had environmental issues. And I didn't want to put

1 those guys through mediation at the time. That was what I  
2 had in mind when I put that into place.

3 On June 4th, 2012, I entered a second amended  
4 mediation order which lacked the language exempting claims  
5 filed by the U.S. and also stated that the first amended  
6 mediation order was "supplemented, just provided herein."  
7 The purpose of that second order was to expand the scope of  
8 ADR because, frankly, this case, which has in the ballpark  
9 70,000 claims, would swamp us even before sequestration and  
10 even more so now.

11 The issues before me boil down to issues of two  
12 types: One of construction of orders and with respect to  
13 the power I have to order it, and the second is whether,  
14 assuming I have the power, that I should exercise that power  
15 in the exercise of my discretion.

16 On the first issue, I determined that I do have  
17 the power to do it and I've had that power under orders I've  
18 entered at least since the second order of the three, and  
19 that I also have the power under M-360. I indicated what I  
20 meant by the purpose of carving out the government.

21 In any event, even if I'm not allowed to look to  
22 my understanding of the purpose, I look to the textural  
23 analysis plain meaning interpretation that the Supreme Court  
24 has told me that I'm supposed to do in cases like Ron Pare  
25 (ph). And filed by is not the same as for the benefit of

1 the U.S. government. Plainly, the U.S. government would get  
2 the lion's share of any successful recovery in the QTem  
3 action, but the action wasn't filed by the U.S. government.  
4 It was filed by the private individuals, the folks who were  
5 carrying the sword for the U.S. government and pursuing the  
6 claims that are the subject of the controversy between GM  
7 and the individual relators.

8 I also appreciate the candor reflected by Mr.  
9 Helmer in paragraph 22 of his submission where he recognized  
10 that even if it wasn't covered by the earlier orders, or at  
11 least orders number 2 and 3, it would still be within my  
12 power to order under M-360.

13 So then we get to the second issue which is  
14 whether I should still order it in the exercise of my  
15 discretion. I don't regard that as particularly close.  
16 While I do acknowledge, as Mr. Helmer pointed out, that the  
17 earlier efforts at a consensual resolution through mediation  
18 many years before the filing of this bankruptcy case -- Mr.  
19 Smolinsky says it was 2004. Mr. Helmer says it may have  
20 been 2004, but he's not sure -- but both sides agree that it  
21 was way, way before 2009 when this 11 was filed. It wasn't  
22 successful then, but the parties were negotiating, were  
23 mediating in a different environment in those days.

24 The bleak house aspects of the litigation in Ohio  
25 and Washington, D.C., when it went up to the Supreme Court,

1 were only partly apparent at that point. And the debtor did  
2 not then have the motivation to bring this Chapter 11 case  
3 to an end and to get further distributions to its unsecured  
4 creditor community.

5 Also, frankly, the GM that was litigating back in  
6 2004, while technically the same entity as Motors  
7 Liquidation Company, or at least seemingly such, may have  
8 had a different mindset of its financial condition than GM  
9 has now. I can't predict, of course, the success of any  
10 further negotiation or mediation. But I think there is more  
11 recent belief or hope that any mediation would be successful  
12 now.

13 Also, to be frank, the costs of continuing to do  
14 battle to both sides are likely to be monstrous, and if it  
15 were to be litigated in this court as claims for other than  
16 personal injury, matters normally it would be, the burdens  
17 on this court, which is already up to its eyeballs not just  
18 by reason of GM, but in no small part because of GM, not all  
19 of those claims being of the type we have here, of course,  
20 are enormous.

21 Conversely, if I were to send this case out with  
22 the relief from the stay to be liquidated elsewhere would  
23 place very great demands on the GM Motors Liquidation  
24 unsecured creditor committee.

25 So for all of those reasons, I am exercising my

1 discretion to see if we can get this resolved by mediation.  
2 If the mediation is unsuccessful, as both my orders provide  
3 and as all old-fashion due process would require, it's  
4 without prejudice to the rights of the parties to agree to  
5 disagree and tee it up for a judicial determination whether  
6 I finally determine that it should be heard.

7 Now by reason of that, folks, and I'm going to so  
8 order the record, but you can follow with a written order if  
9 you want, Mr. Smolinsky. If you do that, I would ask that  
10 you work out its form with Mr. Helmer in a mutually  
11 satisfactory way and that you settle it only if you're  
12 unsuccessful in doing that.

13 Then we get to the matter of claims estimation.  
14 My tentative, subject to your rights to be heard, is that I  
15 should defer consideration of claims estimation until you  
16 guys have tried to mediate and we see where that goes, and  
17 we see whether that is successful.

18 I could, at your recommendation, then, either deny  
19 the estimation motion without prejudice or merely continue  
20 it with simply a holding date, and I would like both sides  
21 to weigh in on what's the best way to proceed in that  
22 connection.

23 First you, Mr. Smolinsky.

24 MR. SMOLINSKY: Thank you, Your Honor.

25 We don't need an order. So ordering the record is

1 fine with us. It's -- Mr. Helmer, it's up to him whether he  
2 wants an order. I can't imagine he has any appellate  
3 interest, but we'll do an order if he wants to, otherwise  
4 we'll just stick with the record and start the mediation  
5 process.

6 In terms of the estimation, I think -- I think it  
7 makes sense to defer discussion about what that would entail  
8 until after the mediation process. We believe that the  
9 estimation -- the mediation will probably conclude around  
10 the week of September 16th. So perhaps we schedule a -- an  
11 adjourn date for the estimation motion until the week after,  
12 see where we are, and Mr. Helmer and I will make efforts to  
13 work out a schedule -- a scheduling order for the estimation  
14 subject to Your Honor's views to be discussed at that  
15 adjourned hearing.

16 THE COURT: Uh-huh. Mr. Helmer, may I get your  
17 perspective, please?

18 MR. HELMER: I have a couple of comments, Your  
19 Honor.

20 I understood you. We don't need an order from the  
21 Court. I think your record that you've made is sufficient,  
22 first.

23 Secondly, I -- I don't have a problem with  
24 delaying the decision on the estimation until we see how  
25 mediation works out. If you want to just hold in abeyance

1 the pending motion, that's -- that's fine with us because as  
2 I pointed out earlier, we support the position of the trust  
3 for the most part in that -- that motion.

4 Third, Your Honor, in terms of scheduling this, I  
5 am currently scheduled for two trials in the month of  
6 September, both happen to be in -- one's in Indiana and  
7 one's in Kentucky. It might be difficult for me to --

8 THE COURT: Kentucky near Covington, close to  
9 Cincinnati or farther away in Kentucky?

10 MR. HELMER: It originally started in Warsaw.  
11 It's now in Boone County, which is right on the line between  
12 the two counties, Boone County Common Police Court. It's a  
13 triple fatality, so it's been going on for several years  
14 also. We're trying to get it wrapped up.

15 So September may be a problem, but -- but I will  
16 endeavor to find time in August to address this if Mr.  
17 Smolensk's calendar will accommodate that.

18 Fourth, Your Honor, and finally, since Mr.  
19 Smolinsky raised the issue of exchanging information for  
20 this mediation, there is a filing that was made in this  
21 court by the trust that attached the asset purchase  
22 agreement between Rolls Royce Company and General Motors  
23 when they bought the Allison Engine Company in 1993, I  
24 believe.

25 For some reason, that asset purchase agreement,

1 which was an exhibit, is no longer available to the public.  
2 I have been unable to get the document from the clerk's  
3 office and have not been able to get the document from the  
4 trust. I think I'm entitled to see it. I think it bears on  
5 the mediation because it will tell me what assets and  
6 liabilities were accepted by Rolls Royce when they took over  
7 the Allison Engine Company.

8 If you remember, Your Honor, Allison -- there's --  
9 had three bodies here. During the first 16 destroyers,  
10 General Motors owned Allison Engine. During a period after  
11 that for about 14 months, Allison was a stand-alone company.  
12 Then after that in 1995 Allison was purchased by Rolls Royce  
13 Company. So we have destroyers built during all three of  
14 those categories with different ownership of Allison Engine  
15 Company.

16 I want to see what's in the asset purchase  
17 agreement to see what Rolls Royce took on from General  
18 Motors. In fact, I was very surprised to see they took on  
19 anything. I thought Allison had been a stand-alone company  
20 for over a year when Rolls Royce entered the picture.

21 So I'm asking the Court -- it was publicly filed.  
22 I cannot find any order in which you sealed it. I cannot  
23 find any order in which you withdrew it, but it's not  
24 available to me.

25 THE COURT: Uh-huh.



1           Mr. Smolinsky, if there had been a sealing order,  
2 chances are Mr. Helmer would have found it. Was that  
3 intentionally kept out of the public eye?

4           MR. SMOLINSKY: Yes, Your Honor. After we filed  
5 the motion, there was a discussion. Rolls Royce raised  
6 certain confidentiality issues. If I recall correctly, we  
7 reached out to chambers at the time and simply did it  
8 together, cooperatively, and -- and amended the document on  
9 the ECF system to -- to redact that entire agreement.

10           Since Mr. Helmer raised the issue, we did reach  
11 out to Rolls Royce to ask them whether they would  
12 cooperatively allow us to share that document with Mr.  
13 Helmer under confidentiality, if necessary. We have not  
14 heard -- received a response yet, but we'll continue to --

15           THE COURT: Okay.

16           MR. SMOLINSKY: -- work on that.

17           THE COURT: Well, I -- I think your instincts were  
18 sound in assuming that it was a document appropriately to be  
19 given to Mr. Helmer, although, also, under a suitable  
20 confidentiality order that he would take it as a  
21 confidential document.

22           It -- I haven't seen the document and I have no  
23 idea whether it would be relevant to Mr. Helmer's needs and  
24 concerns, but it's not all that different analytically from  
25 the fact that when you have a tort litigation, insurance

1 policies are normally producible even though they don't go  
2 to the merits of the underlying controversy because they --  
3 their disclosure frequently facilitates settlement.

4 What I want you to do is this, Mr. Smolinsky. I  
5 want you to send a piece of paper to Rolls Royce, copy to  
6 Mr. Helmer, copy to counsel for the GUC Trust saying, notice  
7 of intention to disclose to Mr. Helmer X document. It's  
8 also to say that he will get it if, but only if he enters  
9 into a reasonably satisfactory confidentiality agreement.

10 Set a deadline. See if you and Mr. Helmer can  
11 agree on what's fair to him and fair to Rolls Royce for them  
12 to object to me. If they object to me, I'll decide it with  
13 an on the record conference call. If they don't object,  
14 then you give it to Mr. Helmer under a confidentiality stip  
15 or agreement.

16 Will that work for both sides?

17 MR. SMOLINSKY: Yes, Your Honor.

18 THE COURT: Mr. Helmer?

19 MR. HELMER: Your Honor, I need it before the  
20 mediation. I --

21 THE COURT: Oh, I well understand. And that  
22 reminds me of one other thing I was also going to say,  
23 subject to your rights to be heard.

24 This mediation, if it's going to be successful,  
25 it's going to cut off at least as far as GM is concerned 18

1 years of litigation. You are going to have to set the  
2 mediation at a time that works for Mr. Helmer, and if that  
3 requires kicking the mediation back a few weeks or even a  
4 month or two, it's time well spent.

5 So I am ordering mediation, but I'm also saying it  
6 has to be at a time reasonably satisfactory to Mr. Helmer.

7 MR. SMOLINSKY: Under -- understood, Your Honor.  
8 We recognize that putting together mediation statements in  
9 this case are going to take some time as well. So we'll  
10 work out a schedule.

11 THE COURT: Okay.

12 Mr. Helmer, does that additional qualification  
13 that I added help you vis-à-vis the timing of the agreement?

14 MR. HELMER: It does, Your Honor. And if I could  
15 impose upon the Court on one additional matter. Having the  
16 mediation in Cincinnati or Dayton, since counsel will have  
17 to travel anyway, would also help us as opposed to having us  
18 to go to Detroit, San Francisco, New York or wherever else  
19 it -- the mediators are.

20 THE COURT: Does that present any problem, Mr.  
21 Smolinsky?

22 MR. SMOLINSKY: Obviously, I don't have my client  
23 here. We prefer to do it at the mediation sites, but I'm  
24 sure that we can work -- work things out. I will say that  
25 we have mediators on our panel throughout the United States

1 that have various levels of expertise. We have a mediator  
2 in San Francisco that has very specific QTem and false  
3 claims act experience.

4 So, again, we'll -- I'm sure that we'll be able to  
5 work out an agreeable location and an agreeable mediator.

6 THE COURT: Okay. I don't like to micromanage my  
7 cases.

8 I do care about the mediator knowing what he's  
9 doing, what she's doing. I think that that helps get better  
10 settlements. But beyond that, I don't care what you guys  
11 agree upon. I do think that sooner rather than later is for  
12 you to get into and work cooperatively, let us reason  
13 together mode.

14 Okay. So let's make it happen.

15 Anything else on GM? I've got a lot of people  
16 that have been waiting a long time on another matter.

17 MR. SMOLINSKY: No. Thank you very much, Your  
18 Honor.

19 THE COURT: Okay. Thank you.

20 MR. HELMER: Thank you, Your Honor.

21 THE COURT: Okay. Have a good day.

22 (Whereupon, these proceedings were concluded at 11:22  
23 a.m.)  
24  
25

I N D E X

RULINGS

Page Line

Doc. #12463 Motion to Compel Roger L.  
Thacker, Roger L. Sanders, and Thomas J.  
Hanson to Participate in Mandatory  
Mediation with Respect to Claim No.  
27105 Pursuant to the Second Amended  
ADR Order

23 7

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT\*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sherri L  
Breach

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